Unit 1

The concept of law

Learning objectives

At the end of this unit, you should be able to:

- Give a definition of the term “law”
- Give a definition of labour law
- State the purpose of the law in general and labour law specifically
- Distinguish between individual- and collective labour law
- Explain the principle of constitutionalism
- Explain the interaction between norms of behaviour and legal rules
- Examine the different criteria for justice
- Briefly discuss the content of the rules of natural justice
- Identify and define the different basic legal concepts in a labour context

Additional reading


Namibian Constitution
1. INTRODUCTION

This unit provides a broad overview of some general aspects of the concept of law, including its definition. We include a discussion on whether we need laws, who makes the laws and we discuss whether justice is reflected in law against the backdrop of the principle of constitutionalism. Lastly, we conclude the unit by focussing on some basic legal terms and concepts encountered in the field of labour law.

2. WHAT IS “LAW”?

The law can be defined as a system of rules governing human relations in a community, which is recognised by the legal system and enforced by the Courts of law as organs of the State’s authority.\(^1\)

Laws are thus rules informing legal subjects\(^2\) what they may do (their rights), while other rules inform them what they must do or may not do (their duties or obligations). The legal rules also say what the consequences of our actions will be, for example, punishment in the form of imprisonment or a fine or both; an order to do something or not to do something, to restore something and/or an order for the payment of compensation to another party who suffered financial losses, known as “damages”.\(^3\)

The emphasis is on “duties”, however, most people put the emphasis on “rights”. One must, though, remember that rights and duties are two sides of the same coin: One person’s rights create duties for another. A “right” can be described as any right, which a legal subject has with regard to a specific legal object and which is protected by law. For example: When two individuals conclude a contract of employment, the employee is obliged to deliver a service while the employer is obliged to pay the agreed remuneration in return for this service. The employer has the corresponding right to receive the service and the employee the corresponding right to receive the remuneration.

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1 Hahlo & Kahn: *The South African Legal System and its Background*, Juta, Cape Town, 1968, at page 3
2 See explanation of “legal subjects” in paragraph 13 at the end of this unit.
3 See explanation of “damages” in paragraph 13 at the end of this unit.
The legal subjects are obliged to abide by the laws of the State while the State is obliged to secure the safety of its subjects. Legal rules, however, do not only apply between the State and its subjects, it also applies between individuals. For example, rules that prescribe the formalities that some relationships require in order to be considered valid and binding by the law, for example, the rules and formalities of marriage.

The origin and current laws of Namibia will be discussed further in Unit 3 of this guide, where you will learn that the Namibian legal system consists of a variety of sources of law. Therefore, when reference is made to the term “law”, it includes both legislation, as formal written rules, and other legal rules applicable in Namibia.

3. **DO WE NEED LAWS?**

Without sometimes realising it, our daily lives are constantly regulated and affected by laws.

Consider an ordinary day in the life of Molly: She is a single mother; employed as a clerk at the Office of the Labour Commissioner in Windhoek; has two children, aged 7 and 10 years respectively, both attending school at Suiderhof Primary School; rents a flat in the backyard of her brother’s residence and buys her groceries every month on credit from the supermarket around the corner.

The law affects all of the following relationships in Molly’s life:

- Family relationships
- Employer-employee relationships
- Relationships between lessor and lessee
- Consumer-trader relationships
- Citizen and State relationships

Laws are necessary to facilitate peaceful and productive interaction between human beings within a specified community. The **purpose** of any **legal system** is to **regulate the relations of its people**. The latter may be individuals, groups or legal entities. In any society there is a need for rules to govern these relationships, including the relations between the government and its subjects. It further provides **security** and **certainty** at a basic level.
4. **WHAT IS “LABOUR LAW”?**

Labour law principles regulate a number of relationships in the labour market. Some examples are the relationships between:

♦ An employer (natural / juristic person) and employee (an individual)
♦ An employer and a large number of employees
♦ An employee and a trade union
♦ An employer and trade unions (bodies that represent employees)
♦ Employers’ organisations (bodies that represent a number of employers) and trade unions
♦ The State, employees, employer, trade unions and employers’ organisations.

With the above information in mind, we can now define labour law as a system of rules regulating relationships between employers and employees; employers or employers’ organisations and trade unions; employees and trade unions and the link between the State, employers, employees, trade unions and employers’ organisations. The State has a particular interest in the labour relationship, as the peaceful conduct of that relationship will contribute to the economic welfare of the whole society. The State will intervene in the labour relationship to ensure that the power play between the various role players does not reach a stage where it negatively affects economic activity and the well-being of the society as a whole.

5. **INDIVIDUAL – AND COLLECTIVE LABOUR LAW**

The relationships in the workplace can be divided into two broad categories, i.e. individual labour law, that focuses on the relationship between the employer and the individual employee and collective labour law, which concentrates on the relationship between collective entities or groups such as collective bargaining between employers and trade unions as well as strikes and lockouts. In Labour Law 1A, the focus shall be on individual labour law, while the different aspects of collective labour law shall be dealt with in more detail in Labour Law 1B.
6. THE PRINCIPLE OF CONSTITUTIONALISM

Article 1: Namibian Constitution: Establishment of the Republic of Namibia and Identification of its Territory

In 1990, the people of Namibia accepted and adopted the Namibian Constitution as the fundamental and supreme law of our sovereign and independent Republic and thereby introduced the principle of constitutionalism. Constitutionalism means that the government of a country is obliged to rule in accordance with the Constitution.

Article 1(6) of the Namibian Constitution proclaims the Constitution as the supreme law of the Republic of Namibia, meaning that any law or Act inconsistent with its provisions shall have no force or effect to the extent of such inconsistency. The phrase “to the extent of such inconsistency” means that not the whole law or Act which has an inconsistency with the Namibian Constitution is declared to have no force or effect, but only that portion or provision which is indeed unconstitutional, for example: Suppose a provision in legislation states that: “No Court of law shall pronounce on the validity of any action done under this law.” Such a provision is in effect taking away the right to approach a competent Court for redress should a person be aggrieved. This would be in direct conflict with the Namibian Constitution that guarantees every person this right in terms of Article 18 and Article 25(2) thereof. Thus only this provision, being inconsistent with the Constitution, will have no force or effect and the rest of the legislation will remain effective and enforceable.

The Namibian Constitution provides the Courts with the power to review legislation so that all legislation can be tested against the provisions of the Constitution.

In terms of Article 1(1) of the Namibian Constitution, the Republic of Namibia is founded upon the principles of democracy, the rule of law and justice for all. It also contains a chapter on fundamental human rights and accordingly seeks to entrench the freedom, equality and human dignity of all individuals.

Inherent in the principle of constitutionalism is an attempt to limit the State’s authority in order to protect a free and open democracy. A Bill of Rights [Chapter 3 of the Namibian Constitution] as part of a Constitution is

See explanation of “rule of law” in paragraph 13 at the end of this unit.
considered the best means of protecting the rights and freedoms of the individual against the governing authorities and intolerance of the majority. In addition to defining human rights, the Namibian Constitution specifies the organs of government, their relationship, powers and functions.

7. THE CONSTITUTION AND LABOUR LAW

Chapter 3 [Fundamental Human Rights and Freedoms] of the Namibian Constitution contains several provisions of relevance to employment and labour law, more specifically the articles dealing with respect for human dignity (Art 8); slavery and forced labour (Art. 9); equality and freedom from discrimination (Art. 10); privacy (Art. 13); children’s rights (Art. 15); freedom of association (Art. 21 (e)); freedom to withhold labour without being exposed to criminal penalties (Art. 21 (f)); freedom to practise any profession, or carry on any occupation, trade or business (Art. 21 (j)) and apartheid and affirmative action (Art. 23).

The rights contained in Chapter 3 may, however, be limited, provided that such limitation is reasonable and justifiable.

In Chapter 11 [Principles of State Policy] of the Constitution the State is obliged to actively promote and maintain the welfare of the people (Art. 95) by adopting certain policies aimed at, *inter alia*, equality of opportunity and remuneration for women; prevention of abuse of workers, including children; promotion of sound labour relations and fair employment practices and, where possible, adherence to and action in accordance with the Conventions and Recommendations of the International Labour Organisation (ILO).

8. WHO MAKES THE LAWS?

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Article 44: Namibian Constitution: Legislative Power
Article 45: Namibian Constitution: Representative Nature
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The Legislature, as you may know already, is one of the main organs of the State, the others being the Executive and the Judiciary.

In terms of Article 44 of the Namibian Constitution, the legislative power of Namibia shall be vested in the National Assembly with the power to pass
laws with the consent of the President as provided in the Constitution, subject, where applicable, to the powers and functions of the National Council. Article 45 stipulates that the members of the National Assembly shall be representative of all the people and that they shall be guided by the objectives of the Constitution, public interest and their conscience.

It follows that “the law” is made by the representatives of the people and applies to the people in that society. The law exists for the sake of the people. It further has to provide for the changing needs of a developing community and is consequently inseparably bound up with the community it has to serve. When legal rules do not reflect the present values in the different spheres of life (such as economic-, political-, social- and moral values) of the majority in that particular society, the citizens will lose their confidence in the legal system and it may lead to a legitimacy crisis. Consequently, to ensure that the laws reflect the values of the society it serves, it is not permanent in nature, but is constantly being recreated.

9. THE INTERACTION BETWEEN NORMS OF BEHAVIOUR AND LEGAL RULES

To understand the existence and functioning of the world around us, humans continually formulate rules. These rules fall in one of two main classes, i.e. laws of nature and norms of behaviour.

Laws of nature are statements of fact regarding “what is” and deal with those rules which have been proved irrefutable, for example, the universal law of gravity, e.g. if one casts an object upwards, it will always return to the earth. Norms of behaviour, on the other hand, are statements of how a person should conduct him/herself. Normative systems that influence our lives are, for example, religion, individual morality and community mores.

Individual morality refers to the opinion of the individual as to what is wrong or right. Community mores are the moral values of the group. Both these are often derived from religious beliefs and practices. The fact that the law exists for the sake of the people (represented by the legislators) implies that legal rules and other norms such as religion, individual morality and community mores do not exist in separate worlds.

In a heterogeneous society there will inevitably be differences in the norms of the different groups. The law has to provide for the changing needs of a developing community and is consequently intertwined with the community it has to serve. The morals of a specific community change along with public opinion and social convictions and also put pressure on people making personal choices.
EXAMPLE

The following example illustrates the interaction between individual morality, community mores and the law:

Brian and Jo-Ann decide to engage in an extra-marital relationship. This would be a moral choice, especially if they are both adults who can decide for themselves. However, in certain cases of extra-marital sexual relations, the law has to intervene to protect certain rights. If, for example, a child is born out of wedlock to Brian and Jo-Ann, the law imposes a maintenance duty on the child’s natural parents. Their “free choice” will not exempt them from their legal obligations towards the child. Assume further that Brian is married to another woman at the time of his relationship with Jo-Ann. The law protects the legal integrity of a marital relationship against violation by a third party and this is why Tammy, Brian’s wife, can claim damages from Jo-Ann. The community’s moral views on adultery also changes over time and it is no longer considered as a crime although it still gives Tammy the right to sue Brian for divorce, as his adultery resulted in the irretrievable breakdown of their marriage.

10. THE LAW AND JUSTICE

Article 10: Namibian Constitution: Equality and Freedom from Discrimination
Article 12: Namibian Constitution: Fair trial

The idea that the law ought to be fair and reasonable lies at the heart of the law’s quest for justice. Our Courts try to make just decisions based on criteria of fairness and reasonableness; these criteria are once again influenced by public policy considerations.

The concept “justice” is broad and one of its essential elements is equality. Equality and freedom from discrimination is guaranteed by Article 10 of the Namibian Constitution, which provides that all persons shall be equal before the law and no person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. These rights may, however, be limited on the basis of reasonableness and necessity.

You may find that some laws currently in force in Namibia do not necessarily conform to the principles of justice, as there are still laws dating from the past colonial system. Those laws affect only certain sections of the community in an unfair and unequal manner. But why do
we still have these laws? The answer relates to the principle of constitutionalism discussed above. These laws will remain in force in terms of both Article 25 (1)(b) and Article 140 (1) of the Namibian Constitution until the High Court or Supreme Court rule otherwise or until such laws are repealed or replaced by the National Assembly. These Articles of the Namibian Constitution provide that all laws, which were in force immediately before the date of Independence, shall remain in force until amended, repealed or declared unconstitutional by a competent Court.

11. CRITERIA FOR JUSTICE

In order to judge the fairness of a legal process, the following criteria shall serve as a guideline:

- **Similar cases must be treated in a similar manner.** Judgments of the Courts (also known as case law or judicial precedents) form part of an existing body of rules, which must be followed in the interest of legal uniformity and certainty (unless certain exceptions apply\(^5\)).

- In terms of Article 12 of the Namibian Constitution, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law;

- All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

- All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and

- Shall be entitled to be defended by a legal practitioner of their choice.

- Adherence to the **rules of natural justice**.

These same criteria shall apply when the fairness of a disciplinary process at the workplace needs to be determined with one slight difference in that the employee does not have the right to insist on representation by a legal practitioner. An employee does have a right to representation, but, as a general rule, an employer has the right to limit such representation by someone from within the organisation.

\(^5\) For example, where new legislation needs to be followed or where the Court is convinced that the previous decision is wrong.
12. RULES OF NATURAL JUSTICE

The basic principles in terms of which disputes have to be heard are known as the common law rules of natural justice and these rules are:

♦ *audi alteram partem*,

and

♦ *nemo iudex in sua causa*

These rules are extremely important and we therefore need to examine them in more detail.

12.1 *Audi alteram partem* literally means “listen to the other side”. This implies that the presiding officer has to allow each party to the proceedings an opportunity to state his or her case before Court. It is therefore required that each party is afforded an opportunity to present his/her version of the facts and to comment on all the material and/or evidence to be considered in arriving at a decision. In order to allow a party to prepare his or her case adequately, sufficient and reasonable notice of the impending action is required. This means that a party should be provided with information on the precise charges s/he has to answer and such notice should be given a reasonable period in advance of the hearing. What would amount to a reasonable time would depend on the circumstances of each case.

12.2 *Nemo iudex in sua causa* means that no one may act as a judge in his or her own cause, i.e. may have no personal interest or derive any benefit from the outcome of a dispute. The presiding officer should be an impartial (unbiased or objective) person whose *bona fides* in the conduct of the hearing cannot be questioned.

13. BASIC LEGAL TERMS AND CONCEPTS IN A LABOUR CONTEXT

13.1 Act (also known as “Act of Parliament” or “legislation” or “statute”)

Legislation passed by Parliament. When you refer to a particular piece of legislation, for example the Labour Act, you should always use a capital letter, since the word “act” also has a different meaning, i.e. something that is done by a person, either in the context of a noun or verb.

The difference between primary and secondary legislation is discussed in Unit 3 of this guide.
13.2 Affidavit

A written statement of events made by a person who swears that it is true in the presence of a person duly authorised to administer an oath.

13.3 Appeal

Appeal is the process during which a higher forum (e.g. the Labour Court or High Court) reconsiders the decision and the reasons for the decision, based on the facts presented during the lower forum proceedings (for instance, arbitration or Lower Courts). An appeal is lodged when the Court or arbitrator has allegedly erred in its decision. The focus is on the result of a trial. The party instituting the appeal is called the appellant and the other party becomes the respondent.

13.4 Arbitration

Arbitration is a process in which an independent third party hears the evidence being presented by the respective parties and then determines the dispute between them.

13.5 Arbitrator / Arbitration tribunal

Person(s) designated to determine a dispute between two parties or an individual appointed as such by the Minister in terms of section 85 of the Labour Act 11 of 2007.

An arbitration tribunal has jurisdiction to hear and determine any dispute or other matter arising from the interpretation, implementation or application of the Labour Act.

13.6 Assessor

Person selected to advise the Court or arbitrator on technical questions pertaining to the facts of a case and to assist in the reaching of a decision.

13.7 Award

Decision of an arbitrator or arbitration tribunal.

13.8 Bona fide

This is a Latin term meaning “good faith” and it is used to indicate genuineness and honest intention. The opposite would be mala fide, which in turn means “bad faith” and indicates deceitful and dishonest or bad intentions.
13.9 Breach of contract

Breach of contract is committed where the one party does not perform at all, performs late or performs in a wrong manner and such default must be due to the fault of that party. A contract is breached when there is non-compliance with a material term of the agreement.

13.10 Case law

Case law is also known as judgments of the Courts or judicial precedents. As discussed earlier, in the interest of uniformity and certainty, the decisions of the Supreme Court and High Court of Namibia have binding force and serves as a significant factor in predicting the decision of the Court in a new legal dispute. The interpretation and application of legislation, common law and other sources of our law are to be found in case law.

13.11 Cause of action

The reason for the claim or the facts that gave rise to a legal action or complaint.

13.12 Collective agreement

A written agreement between one or more registered trade unions on the one hand and one or more employers or employers’ organisations (or both) on the other hand, concerning terms and conditions of employment or any other matter of mutual interest.

13.13 Common law

The common law of Namibia consists of that part of our law that we have inherited through our common history with South Africa and will remain to be law, unless it is unconstitutional or changed by legislation.

Most of the implied duties of an employee, for example, the duty to act in good faith and to promote the employer’s business, originate from common law.

13.14 Compensation

Where a party suffered financial losses as a result of an unlawful act or omission of another, such party is entitled to claim these losses from the guilty party. In law, a claim for compensation for financial losses is also known as a claim for “damages”. A victim of breach of contract is also
entitled to claim compensation (or damages) for losses suffered as a result of the breach.

13.15 Compliance order

A labour inspector has the power to issue a compliance order in an instance where there are reasonable grounds to believe that an employer has not complied with any provision(s) of the Labour Act 11 of 2007. An employer must comply with such compliance order, unless an appeal against such order is lodged in the Labour Court. Such appeal must be lodged within 30 (thirty) days after receiving it.

13.16 Conciliation

Conciliation is a process whereby an independent third party assists the parties to a dispute to try to reach a settlement. The conciliation process is managed by the independent third party, but the outcome is determined by the parties themselves and no settlement may be imposed on any party.

13.17 Conciliator

An independent third party responsible for the conciliation process.

13.18 Contract

An agreement entered into by two or more persons (a person cannot contract with himself alone) with the serious intention of bringing about an obligation, provided that certain requirements must be met in order for this obligation to be valid.

13.19 Costs

Expenses relating to a lawsuit or arbitration proceedings, more specifically costs incurred by the litigating parties.

Both the Labour Court and the arbitration tribunal may not make an order for costs against a party unless that party acted in a frivolous⁶ or vexatious⁷ manner by instituting, proceeding with or defending those proceedings.

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⁶ Not sensible or serious; wasteful.
⁷ Annoying
13.20 Court(s)

For the purposes of the administration of justice, the judicial power of the State is vested in the Courts of Namibia, having the authority to enforce the law and adjudicate disputes between parties. The Namibian Court system consists of the Supreme Court of Namibia, a High Court of Namibia and the Lower Courts of Namibia (Magistrates’ Courts, Regional Courts and Community Courts).

13.21 Crime

A crime can be defined as unlawful conduct for which the wrongdoer is liable to punishment by the State. Crimes can be divided into two main classes, i.e. common law crimes and statutory law offences. (Please note that we explain the difference between common law and statutory law in Unit 3 of this guide.)

Before it can be said that someone has committed a crime, the following minimum requirements have to be met: There must be an act or omission, which is unlawful and the accused can be blamed.

13.22 Damages

Please refer to the discussion in par. 13.14 (Compensation) above.

13.23 Delict

A delict can be defined as an unlawful act or omission that causes harm to the person, property or personality of another. Other elements of a delict are fault, causation and damages or impairment of personality. It is important to take note of this concept in a labour context, because of the principle of vicarious liability in terms whereof an employer can be held liable for the delicts of an employee in certain prescribed circumstances.

13.24 Dismissal

Termination of a contract of employment by an employer, either with or without a notice period, is called dismissal. Any termination by an employer is called “dismissal”, irrespective of the reason for such termination. To qualify as a fair dismissal, the requirements of substantive and procedural fairness must be met. Further detailed discussions on these requirements shall follow in your studies of Labour Law 1B.
13.25 Domestic work

Work performed in or for a household.\(^8\)

13.26 Domestic worker

Any person performing domestic work in an employment relationship, including a child-minder, cook, driver, gardener or housekeeper.\(^9\)

13.27 Employee

The Labour Act 11 of 2007 defines an employee as an individual, other than an independent contractor\(^10\), who works for another person and who receives, or is entitled to receive remuneration for that work; or in any manner assists in carrying on or conducting the business of an employer.

The concept “employee” is further defined for the purposes of other relevant labour legislation, same to be set out in more detail in your studies of Labour Law 1B.

13.28 Employer

The Labour Act 11 of 2007, as amended\(^11\), defines an employer as any person, including the State, and a user enterprise\(^12\), which employs or provides work for an individual and who remunerates or undertakes to remunerate such individual; or permits an individual to assist that person in any manner in carrying on or conducting that person’s business.

13.29 Independent contractor

The Labour Act 11 of 2007, as amended\(^13\), defines an independent contractor as a self-employed individual who works for or renders services to a user enterprise or customer as part of that individual’s business, undertaking or professional practice.

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\(^{8}\) As defined in the Regulations relating to domestic workers, GN 257, published on 24 December 2014.

\(^{9}\) Ibid

\(^{10}\) See meaning of “independent contractor” below.

\(^{11}\) Labour Amendment Act 2 of 2012, GN 98, published on 12 April 2012, in operation since 1 August 2012.

\(^{12}\) See meaning of “user enterprise” below.

\(^{13}\) Labour Amendment Act 2 of 2012, GN 98, published on 12 April 2012, in operation since 1 August 2012.
13.30 Interdict

A Court order restraining a person from doing something, for example, interdicting an illegal strike action, or requiring a person to do something, for example, ordering the employer to ensure a safe and/or healthy workplace.

13.31 International Labour Organisation (ILO)

Namibia is a member of the International Labour Organisation (ILO), a United Nations (UN) agency, established in 1919 and seated in Geneva, Switzerland. The objectives of the ILO are, inter alia, to promote social justice and internationally recognised human and labour rights by means of a number of Conventions and Recommendations.

13.32 Judge

Judicial officers (also referred to as presiding officers) in the Supreme Court and High Court are referred to as Judges. In terms of the Namibian Constitution, Judges are appointed by the President on the recommendation of the Judicial Services Commission.

13.33 Judgment

Decision or order by a presiding officer in Court.

13.34 Juristic Act

A juristic act can be described as an act that has, or intends to have, legal consequences. A juristic act may be:

♦ Unilateral (one party), e.g. the making of a will or the cancellation of a contract; or
♦ Bilateral/multilateral (two or more parties), e.g. the making or varying of a contract.

13.35 Justice

The person(s) presiding over a Community Court is known as a Justice(s), appointed by the Minister of Justice.

13.36 Labour Commissioner

The Labour Commissioner, appointed by the Minister, is responsible for the administration of the Labour Act; mainly to prevent disputes from
arising and to attempt to resolve disputes between employers and employees, through the processes of conciliation and arbitration.

13.37 Labour inspector

The Minister may appoint labour inspectors to enforce compliance with the Labour Act or any decision, award or order made in terms thereof.

13.38 Legal subjects

Legal subjects are human beings (natural persons) or juristic (legal) persons subject to the law and include foreigners operating in the economic society within the borders of Namibia. As a general rule, every legal subject has legal capacity, i.e. the capacity to:

- Be the bearer of rights and duties
- Perform juristic acts and
- Sue and be sued as a party in a lawsuit (also referred to the capacity to litigate)

However, although every person has the capacity to be the bearer of rights and duties, not all persons can perform juristic acts and litigate.14

The law recognises two categories of persons, that is, natural persons and legal/juristic persons.

(a) Natural persons

A natural person refers to a human being.

(b) Juristic persons

Juristic persons can be described as entities recognised by law as the holders of rights and subject to duties. Categories of juristic persons are as follows:

- Companies, Close Corporations; Banks (in terms of general enactments of Parliament);
- Universities, Polytechnics; Namibian Broadcasting Corporation (under special enactments of Parliament); and
- Voluntary associations such as churches, clubs and political parties.

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14 For example, people who have been declared mentally insane do not have the capacity to perform juristic acts or to litigate.
13.39 **Magistrate**

The Magistrates’ Courts and Regional Courts are presided over by magistrates.

13.40 **Minister**

Minister responsible for labour matters, now known as the Minister of Labour, Industrial Relations and Employment Creation.

13.41 **Obligation**

In a legal context, the term obligation (also referred to as a duty or responsibility) refers to a legal bond between the legal subjects in terms of which one person is bound to render a performance of some kind to or for the other. These obligations may come about through contract, delict or through other various courses such as unjustified enrichment. A legal obligation may consist in giving something, doing something or in not doing something. The debtor has a duty to render the performance, while the creditor has a right to receive it.

13.42 **Onus of proof / burden of proof**

This means the duty or responsibility of a party to prove his/her/its claim. The general rule in law states that the one who claims must prove, but the burden shifts in some instances in labour matters. For example, an employee who claims that he or she was dismissed unfairly only needs to prove that there was a dismissal. It is the duty of the employer to prove that the dismissal was fair.

In a criminal matter, the State must prove beyond reasonable doubt that the accused is guilty of the crime, while in civil litigation, the party who has the responsibility or onus of proof, only needs to prove his or her case on a balance of probabilities. In a disciplinary hearing at the workplace, an employer also needs to prove the employee’s guilt on a balance of probabilities.

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15 There cannot be any doubt that the claim is in fact true; there is no plausible reason to believe otherwise.

16 The dispute will be decided in favour of the party whose claims are more likely to be true. Therefore, it is only required to prove that there is a possibility that it could be true. The burden of proof is lower than that of “beyond reasonable doubt”.
13.43 Presiding officer(s)

The person(s) in Court responsible to make a decision (referred to as a judgment or verdict), after having listened and evaluated the evidence presented. Judges, magistrates or Justices, depending on the Court over which such person presides, are all presiding officers.

13.44 Private employment agency

For the purposes of the Employment Services Act 8 of 2011\(^\text{17}\), a private employment agency means any natural or juristic person, except the State, that provides any of the following labour market services:

♦ For matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationship which may arise;
♦ Engaging individuals with a view to place them for work for an employer, who assigns their tasks and supervises the execution of those tasks; or
♦ Other services related to job-seeking, such as providing information.

In this context, “place” means to place, engage, refer, recruit, procure or supply an individual to work for an employer or prospective employer.

13.45 Resignation

If an employee terminates a contract of employment, it is called “resignation”. An employee is allowed to terminate a contract of employment either with or without the required period of notice. It is not required from an employee to provide a reason for termination, unless such employee is bound by a fixed term contract which is to be terminated prematurely.

13.46 Review

A Court judgment or arbitration award is said to be taken under review when a Court of higher instance considers the procedural aspects of the original adjudication process to establish whether there were any shortcomings, which could invalidate the judgment or award. The question is therefore whether the proceedings took place in accordance with the rules of justice and whether the aggrieved party was not perhaps prejudiced by gross irregularities or illegalities.

\(^{17}\) S 1, as amended by the Labour Amendment Act 2 of 2012.
In Labour Law, the review process involves consideration of whether the arbitrator adopted the correct procedures and acted in line with his/her duties.

13.47 Rule of Law

The doctrine of rule of law deals with governance according to law in order to ensure the elimination of arbitrariness and dictatorship by government. Therefore, every act of government or its officials must have a valid foundation in the law and such powers should not be exceeded without constitutional or statutory authority. The laws of Namibia are interpreted and administered by competent Courts duly established under the provisions of the Namibian Constitution or relevant legislation. For the rule of law to be upheld in Namibia, the decisions of our Courts must not only be respected but its independence should be maintained.

13.48 Sale in Execution

The sale of a debtor’s property by public auction following a judgment of the Court against him or her.

13.49 Sue

Take legal action, i.e. to bring an action to a Court of law for adjudication. Another term that is often used is “litigate” and the process is called “litigation”. Litigation means the whole process whereby a dispute is taken to Court so that the Court can pronounce judgment on a matter.

13.50 Tribunal

A person or body with the authority to judge, adjudicate on or determine claims or disputes. From a labour perspective, arbitration tribunals, operating under the auspices of the Labour Commissioner, have been established in terms of the Labour Act 11 of 2007 to resolve labour disputes.

13.51 User enterprise

A legal or natural person with whom a private employment agency\(^\text{18}\) places individuals.

\(^{18}\) See meaning of “private employment agency” above.